97-84011-23

Greer, William

The commission clause

[New York]

c1917

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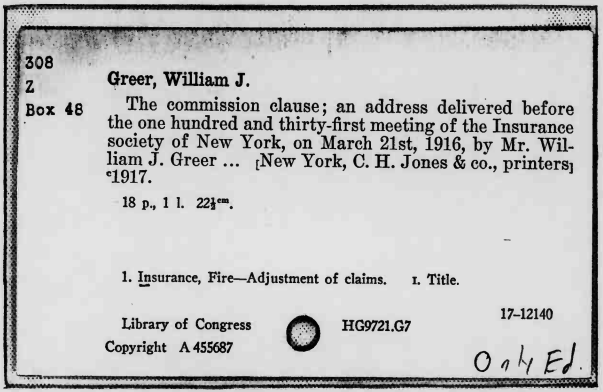

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The commission clause; an address delivered before the one hundred and thirty-first meeting of the Insurance society of New York, on March 21st, 1916, by Mr. William J. Greer ... [New York, C. H. Jones & co., printers] c1917.

18 p., 1 l. 22½cm.

1. Insurance, Fire—Adjustment of claims. I. Title.

Library of Congress HG9721.G7
Copyright A 455687

17-12140

0 1/4 Ed.

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TECHNICAL MICROFORM DATA

FILM SIZE: 35 mm REDUCTION RATIO: 11:1 IMAGE PLACEMENT: IA (IIA) IB IIB

DATE FILMED: 2-4-97 INITIALS: MS

TRACKING # : MSH 21088

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The Commission Clause

AN ADDRESS

DELIVERED BEFORE THE ONE HUNDRED AND THIRTY-FIRST MEETING OF

The Insurance Society of New York

ON

March 21st, 1916

BY

Mr. William J. Greer

The Commission Clause

Mr. President and Gentlemen of the Insurance Society:

For many years it has been the practice in writing insurance upon various kinds of merchandise, to cover not only the property which the assured may actually own but to include that of others in his possession or under his control, and in such cases there is embodied in the form, certain wording which has come to be known in our business as the "Commission Clause". Its use in recent years, in the larger centres at least (except as to stocks of small value and indeed as to many of these) has become the custom and the rule. The agent or broker who, in these days, writes or accepts policies on merchandise without the Commission Clause, would very likely be looked upon as lacking proper training for his chosen vocation or that there was "sand in his sugar."

We are to comment in this paper upon the words "held in trust or on commission or sold but not delivered or removed," otherwise known as the "Commission Clause." We shall speak more particularly, in fact almost entirely, of the words "held in trust or on commission." The balance of the phrase, "sold but not delivered or removed," has no special significance in present day underwriting, it being recoznized that a sale, unaccompanied by delivery, is incomplete and no violation of the policy, and if there has been a legal delivery (and consequently a change in ownership) but no removal, the property, in the absence of an agreement to the contrary, would be covered as "held in trust." The words "sold but not delivered" when used in connection with "held in trust or on commission," actually add nothing to the coverage of the policy.

And likewise I think we may say that had the orginator, or originators (may his or their souls rest in peace) been able to estimate the extent to which their work was destined to be broadened by successive judicial review, they would have also discarded the words "on commission" and contented themselves with "held in trust," in which event their posterity would never have heard of a "Commission Clause," but it might have come down to us as the "Trust or Bailee Clause," certainly a more appropriate description of its scope and function.

This paper is intended to be instructive rather than entertain-

ing, which shall be my excuse for some detail at this time as to the meaning in law, and as used in the insurance contract, of certain of the words in which we shall be interested.

A *trustee,* in the legal and technical sense, is one who holds the legal title to property for the use and benefit of another. There are several kinds of trusts recognized in the law, the details of which are not necessary to this discussion, but a feature to be remembered is that a trust—in the legal and technical sense —can only be created by the intent of the person creating or declaring it, expressed either directly or by such language, conduct, facts or circumstances as will imply, or justify the Court in inferring, that it was the intention to create a trust; two elements to establish a trusteeship in the legal and technical sense; viz: the trustee holds the title and there must be the intent to create or establish a trust.

Now that is a legal trust; if that, and no more, is what is meant by "held in trust" as used in the fire insurance contract, it will be apparent to all of us that there could be few claims under the Commission Clause, for the reason that it rarely happens that the assured, the custodian of the goods, actually holds the title, but our Courts long ago declared that the words were not to be construed in their technical sense, but will include any property which has been placed in the care, custody, possession or control of the assured. In one of the early cases in this country, *Stillwell vs. Staples* (19 N. Y. 40) the Court of Appeals of the State of New York so ruled in a decision handed down in 1859, and in the following language defined its view of the meaning of the words "held in trust," viz:—

> "The words 'in trust' may with entire propriety, be applied to any case of bailment, where goods belonging to one person are entrusted to the custody and care of another, and for which the trustee is responsible to the owner."

In the next ten or twelve years the same question was again passed upon by the New York Court of Appeals in at least two cases (in 1867 in *Lee vs. Adsit,* 37 N. Y. 78, and in 1871 in *Waring vs. Indemnity Fire,* 45 N. Y. 606), as well as by other States, always with the same result; and in 1876 the question came before the Supreme Court of the United States, in *Baltimore Warehouse Company vs. Home* (93 U. S. 593), and it was there held that the term "held in trust" was to taken in a "mercantile" sense, meaning goods which had been entrusted to or deposited

with the warehouse company. Our Courts have continued in the intervening forty years, whenever the question has come before them, to reiterate the principle thus laid down by the earlier cases, and it is the law.

In cases of a trusteeship of the strictly legal kind, it is almost invariably the custom, as it should be, for the Trustee to insure the trust property in his own name as Trustee, thus keeping it separate from any property of his own individual ownership. Instances do occur, it is true, where the custodian holding the title as trustee, claims the loss under the Commission Clause (and in those circumstances, he is within his rights), but in my own experience of ten years in this vicinity, I think I may say such cases, in which I have been interested, may be counted upon the fingers of my two hands.

It will be noted from the foregoing, that as a matter of fact in practically every case of "held in trust," the custodian is not a Trustee at all but a Bailee. A *Bailee* is one who for some purpose or object, has been placed in possession of personal property owned by another, the same property to be returned or delivered when the purpose has been carried out. In the case of bailment, (and herein lies the difference between a trustee and a bailee), the title is not transferred but the bailee is simply the temporary holder and is to restore, or deliver, the identical property in the same or altered form. His obligations to the bailor vary with regard to the circumstances under which the property came into his possession. If he is holding it for the sole benefit of the bailor, as in the case of property on storage for which no storage charge is to be paid, slight care only can be exacted, in fact, practically anything will suffice, short of wilful negligence or intentional misuse: if, on the other hand, the bailment exists for the sole benefit of the bailee, as in the case of the gratuitous loan of some article, he must exercise the greatest care and is liable for even slight negligence, and if he holds the property for the benefit of both parties, as in the case of articles left for repair for which a charge is being made, ordinary precaution must be observed, in other words, reasonable care. In no case is the bailee obligated in the absence of a special agreement, to provide insurance for the benefit of the owner.

As we have seen, certain duties are by law imposed upon the bailee and in the event of the destruction of the property by fire, the circumstances may be such as to render him liable to the owner for the damage sustained, but it is equally true that

he may not be liable for any of it; in fact, unless the owner can establish culpability or the requisite degree of negligence, the law holds him harmless, and the loss falls not upon the bailee, but upon the bailor.

We do not undertake to say at what stage of the development of the insurance business the Commission Clause was introduced, but suggest that as each individual came to recognize the necessity of protection from loss by fire upon his own property, he must also have realized its need as to such loss as might accrue to him with regard to the property of others in his possession, and I can well imagine that the use of something akin to our present-day Commission Clause has obtained in our business from the cradle up.

Be that as it may, I have no doubt that the purpose of the clause, as originally conceived, and the only purpose intended to be served thereby, was simply to extend the protection afforded the assured, to include such loss as *he* might sustain, in the event of a damage by fire, to the property of others in his custody. But the Courts have placed a different construction upon it, and the Commission Clause as now construed will cover the merchandise itself and not merely the assured's interest therein or liability thereon.

A leading authority in this country is the Baltimore Warehouse case, already referred to, and in any review of the question we are discussing, that decision must have a large place. There are gentlemen present, no doubt, who can recite it backward, and they will not be greatly interested in what is just before us, but we younger people, and I count myself one of you, will find in the details of that case much that will help us to a fuller understanding of this question.

The fire occurred in July, 1870. The Baltimore Warehouse Co., as warehouseman, held a large amount of property on storage for various people, including 676 bales of cotton for Hough, Clendening & Co., valued at $52,863. The warehouse company had advanced $48,720 to the owners, for which they held a lien on the cotton and they also held as collateral security, policies aggregating $60,400, which the owners had secured in their own name, each policy covering a specific lot of the cotton, and all with Loss Payable Clause in favor of the Baltimore Warehouse Co. The Warehouse Company had previously taken out insurance in its own name and at its own expense under the following form:

> "On merchandise, hazardous, extra hazardous, their own or held by them in trust or in which they have an interest or liability."

Hough, Clendening & Co. knew nothing whatever of the existence of the latter insurance, had contributed nothing to its cost, but on the contrary, had insured the property in their own name in other Companies, but certain of their Companies took the position that by reason of the fact that the policies were payable to the Baltimore Warehouse Company, both sets of policies covered the same interest and must contribute. In due course, a suit was brought by Hough, Clendening & Co. in the Maryland Courts against one or more of their insurers, resulting in a decision in 1872 by the Court of Appeals of that State sustaining the contention of the owners' insurers (*Hough, Clendening & Co. vs. Peoples Ins. Co.*, 36 Md. 398). In the meantime, the Warehouse Company had settled with their insurers as to all items not in dispute, but had declined to execute final receipts and when the decision of the Maryland Court of Appeals came down, the Warehouse people demanded a further payment from their insurers, which was declined, and the case was again litigated, this time in the Federal Court, and the final adjudication by the Supreme Court of the United States was handed down at the October term, 1876. The insurers contended that they had not insured the cotton, but the Warehouse Company against any loss by fire which it might sustain upon the cotton; that there was no liability as Bailee; that they (the Warehouse Company) had not agreed to insure the goods for the owners, but on the contrary, each warehouse receipt bore a printed notice across its face that the property was "not insured by" the Warehouse Company; and that the Warehouse Company having sustained no loss with respect to the goods in question, could not call upon its insurers.

Here are some of the comments of the Court:—

> "The words of the policy are not satisfied if their import be restrained as the plaintiff in error seeks to confine it. The parties to whom the policy was issued were warehousekeepers receiving from various persons cotton and other merchandise on deposit. They were empowered by their charter to receive bailments and to make charges against the bailors for handling, labor, and custody. They were also authorized to make advances upon the goods deposited with them, and their charges, expenses, advances, and commissions were made liens upon the property. They had therefore an interest in the merchandise deposited with

them, which they might have caused to be specifically insured."

"It was also at their option to obtain insurance upon the entire interest in the merchandise, whether held by them or by the depositors."

"It is undoubtedly the law that wharfingers, warehousemen, and commission merchants, having goods in their possession, may insure them in their own names, and in case of loss may recover the full amount of insurance, for the satisfaction of their own claims first, and hold the residue for the owners."

"There is nothing ambiguous in the description of the subject insured. It is as broad as possible. The subject was merchandise stored or contained in a warehouse. It was not merely an interest in that merchandise. The merchandise of the warehouse company owned by them, was covered, if any they had. So was any merchandise in the warehouse in which they had an interest or liability. And so was any merchandise which they held in trust. The description of the subject must be entirely changed before it can be held to mean what the insurers now contend it means. If, as they claim, only the interest which the warehouse company had in the merchandise deposited in their warehouse was intended to be insured, why was that interest described as the merchandise itself? Why not as the assured's interest in it?

"The words 'merchandise held in trust' aptly describe the property of depositors. The warehouse company held merchandise in trust for their customers, not, it is true, as technical trustees, but as trustees in the sense that the goods had been intrusted to them."

"When they sought insurance of merchandise held by them in trust, it must have been intended of such as they held in trust in a mercantile sense, goods intrusted to them by the legal owners. That such is the meaning of the words as used in this policy we cannot doubt."

Upon the point raised by the Insurance Company that the warehouse receipts carried a notice printed across their face that the property was "not insured by" the Warehouse Company, the Court held that the Warehouse Company was prohibited by its Charter from becoming an insurer itself, and the "notice required to be given the Bailors meant no more than that neither the receiving of the goods, nor the certificate of receipt amounted to a contract of insurance."

And upon the question of contribution as between the two sets of policies, the Court said:—

"The policy upon which this suit was brought covered the merchandise held by the warehouse company on storage, and not merely the interest of the bailees in that property. It follows, necessarily, that there was double insurance. The policy issued to the warehouse company and those obtained by the depositors of the merchandise covered the same property and they were for the benefit of the same owners."

"The insurers are liable, therefore, pro-rata, each contributing proportionately."

The Commission Clause, as we have seen, will cover the merchandise up to its full value, irrespective of whether the bailee is liable therefor or thereon, but it must nevertheless be established, to enable a recovery for property "held in trust or on commission" that the assured's relation to such property was within the description of the policy; that he was actually and legally in possession and that it was intended by him that his insurance should protect such owner (whose name may, or may not, be known).

Stillwell vs. Staples 19 N. Y. 401
Lee vs. Adsit 37 N. Y. 78
Waring vs. Indemnity 45 N. Y. 606
(and various cases there cited).

It has been held, however, that the mere use of the words "held in trust" in the policy implies a case of bailment in which the bailee is responsible to the owner (*Stillwell vs. Staples* supra, also *Utica Canning vs. Home* 132 App. Div. N. Y. 420) and in another and quite recent case in New York (*Czerweny vs. National* 139 N. Y. Supp. 345) this feature is very definitely stated by the Appellate Division in these words:

"The fact that a Trust Clause was inserted in an insurance policy covering the contents of a warehouse, was strong probative evidence that the insured intended to insure another's merchandise, which was stored with him as bailee for hire."

These cases would seem to establish that the presumption is, in this State at least, that when the Commission Clause is put upon a policy, it is put there in pursuance of an intention to protect all owners of property to which the assured stands in any of the several relations described in the policy.

If, on the other hand, it be shown there was no such intention, there can be no recovery. If it were otherwise, great injustice would result, as we shall illustrate by the following ex-

ample:—"A" is a warehouseman or commission merchant. "B" places property in his custody with an agreement that "A" will procure insurance to its full value for the benefit of "B", and "B" is subsequently charged a proportion of the premium. "C" also places his property in the hands of "A", but only under the terms of an ordinary bailment, with no undertaking by "A" to insure for the benefit of "C"; and suppose the value of all property on "A's" premises to be $30,000, of which $10,000 is "A's" own property, $5,000 belongs to "B" and $15,000 to "C". "A" has placed insurance of $15,000 which fully covers his own and the property of "B" for which he is liable. A fire occurs from unavoidable accident, and through no fault or neglect of "A", the entire property is destroyed. If it is permissible that "C" may enforce a claim under the Commission Clause, the recovery of "A" and "B" would be reduced to one-half their loss, when by every rule of fairness and justice, they should be fully indemnified. Two elements absolutely indispensable, to wit: the bailee must bring himself into proper *relationship* and establish it to have been his *intention* prior to the fire, that the policy should protect his bailor.

As a matter of course, the presumption we have referred to cannot apply in a case where a bailee has been expressly exempted from liability (*Burke vs. Continental* 184 N. Y. 77) unless, as happened a few years ago in the State of New York, the Jury should find that although the parties had entered into a written contract that the bailee should not be responsible for loss by fire, he subsequently agreed that he would be liable, and in the case in question, the bailee on the proof stated, collected the entire loss (*Burke vs. Ins. Co.* 1908, 128 App. Div. 391).

Sufficient has been said, I believe, to establish that in every case where the requirements as to relation and intent have been satisfied, the bailee is entitled to collect the entire loss and hold the excess over his own interest for the benefit of those who entrusted the goods to him.

Stillwell vs. Staples, supra.
Baltimore Warehouse Co. vs. Home supra.
Calif. Ins. Co. vs. Union Compress Co. 133 U. S. 387.
Johnson vs. Campbell 120 Mass. 449
(and various cases there cited).

But this does not mean that he may deduct the loss on his own property and distribute the balance of the insurance recovery (if any) to the other owners. It was held in the Baltimore Warehouse Co. case, you will recall, that the Warehouse Company "may recover the full amount of insurance for the satisfaction of their own claims first and hold the residue for the owners," but it should be pointed out that as the Warehouse Company had no goods of their own and their only interest in the property was their lien for advances and storage or other charges, the Court undoubtedly referred to only such claims as were in the nature of legal liens upon the property. The right of the bailee to first deduct his charges or any claims which are in the nature of a legal lien upon the property, has been upheld in numerous decisions and is everywhere conceded.

Generally speaking, we take it the assured, having taken out insurance in his own name and at his own expense, regards it as his own to deal with as he sees fit. Possibly, if not probably, his insurance representative takes the same view, but such may not be the situation if the Commission Clause has been incorporated in his form. The question has been litigated in several States and the view now favored by the weight of authority is that, except as to his charges or claims in the nature of direct liens on the property, he is not entitled to deduct anything (*Boyd vs. McKee* 99 Va. 72) but must share the proceeds of his insurance pro-rata with his bailor.

Johnston vs. Abresch 123 Wis. 130.
Snow vs. Carr 61, Ala. 363.
Siter vs. Morrs, 13 Pa. State 220.
Boyd vs. McKee (Va.) supra.
Southern Cold Storage Co. vs. Dechman (Texas) 73 S. W. 545.
(and various cases there cited).

The Courts have not only conceded to the bailor the right to demand a proportionate share of the bailee's recovery but they have held that where a bailee for hire has insurance with the Commission Clause, and fails or refuses to claim for the bailor's property, or makes a settlement with his insurers without including the loss of the bailor, the latter may, in case the insurance has not been exhausted, make claim directly upon the Companies and may maintain suit in his own name for the recovery of his loss up to an amount not exceeding the unexhausted insurance. The Appellate Division of the State of New York has so held in two cases of striking interest and importance to which we will briefly refer; the Utica Canning Co. sold goods to Lewis DeGroff & Son of New York City; after delivery to DeGroff, the goods

were rejected but it was agreed that the property could remain in DeGroff's warehouse pending a re-sale; no storage was to be charged except that when another customer was found, DeGroff & Son were to be reimbursed for cartage and freight charges. While the goods were so stored, the warehouse burned, with insurance on stock of $140,000, all in DeGroff's name, with form covering:

> "Merchandise, hazardous, not hazardous and extra hazardous, including boxes, labels and other supplies, the property of the assured, or held by them in trust or on commission, or sold but not removed."

The loss of DeGroff & Son on their own stock was $88,000. and that was the amount they claimed from their insurers. Prior to the settlement, demand was made that DeGroff & Son claim also for the loss of the Canning Company, but they declined so to do, and disclaimed any liability whatever with respect to the Canning Company's goods; subsequently they accepted payment of $88,000 from their insurers in full of all claims under the policies and executed receipts accordingly, accompanied by cancellation and surrender of the policies; prior to such payment the Companies were notified of the claim of the Canning Company but denied liability on the ground that their assured, DeGroff & Son, were in no way responsible to the Canning Company. Suit was brought by the Canning Company in its own name directly against the Companies and judgment was granted in its favor, which was sustained by the Appellate Division in a decision handed down in May 1909 (38 Ins. L. J. 813).

Here are some of the rulings of the Court:—

> "DeGroff & Son were bailees for hire, and having insured the Canning Company's goods, were liable to it for the damage sustained."
>
> "We think it was intended by the defendants (the Insurance Companies) that everything which DeGroff & Son should have in their warehouse in the course of their business was to be insured and this would seem to be the only purpose of the slip attached to the policy."
>
> "We think a fair interpretation and meaning of the policies was that they were intended to cover whatever property DeGroff & Son had in their warehouse in the course of their business. The plaintiff's goods were there in the course of such business; the goods were lost and the plaintiff is now entitled to the protection of the policies."

The other decision was in the case of *Czerweny vs. National Fire Ins. Co.*, (Supra), and came down in January 1913. Herman

Jedel was a dealer in fireworks and arranged to store with the A. Jedel Company (a concern in which he was interested but operated as a separate business) a quantity of matches for which he was to pay storage at the rate of ten cents per case. The goods had been purchased from Alfred Czerweny, who wrote Herman Jedel about insurance, saying—"Kindly let me know whether you as the owner, will take responsibility in case of fire, or if you expect me to cover the insurance," and the reply, also by letter, was "according to our agreement you are to effect and attend to the insurance on the matches." Czerweny thereupon procured insurance of $1,300, but he took it in his own name. Fire occurred and destroyed the matches, as well as a large amount of property owned by the A. Jedel Company.

The fire found the following situation:—The matches were owned by Herman Jedel; they were in the custody of the A. Jedel Company as bailee, and were insured in the name of Alfred Czerweny who had parted with the title and had no insurable interest, and as a matter of course the specific insurance was void from inception.

The A. Jedel Company had insurance of $25,000 with the Commission Clause; its loss on its own property was $21,000, which was the amount claimed from its insurers. On payment of $21,000, receipts in full were executed and policies surrendered for cancellation.

Subsequently Herman Jedel assigned his claim to Czerweny who brought suit directly against the Companies which had insured the A. Jedel Company. It was conceded on the trial that the facts regarding the matches had been brought to the attention of the Companies' adjusters prior to payment of the loss, and that liability was denied.

It was contended on behalf of the Companies, that the fact that owner had arranged with Czerweny to provide specific insurance, was conclusive proof, that it never had been the intention that the matches should be covered by the insurance of the A. Jedel Company, but the Court's view was that as neither Herman Jedel or Czerweny were connected with or acting for the A. Jedel Company, the contract of the latter with its insurers could not be altered or varied by the act of these third parties, the precise language of the Court being (in part) "nor can any intention which Herman Jedel may have had in regard to the insurance be imputed to, or taken advantage of by the A. Jedel Company." The judgment affirmed the finding of the Lower Court

that the Bailee intended, when taking out the insurance, to protect the owners of all property in its custody and the Companies were held liable to Czerweny for the amount of his loss.

It was conceded that the specific insurance had never been effective on account of lack of insurable interest, and the question of contribution between the two sets of policies was not raised.

The Court further found in part:

> "The assignee of the owner of matches stored with the insured as bailee for hire was the proper plaintiff in an action and under a trust clause of the policy for loss of the matches; the person for whose benefit a contract is made having the right to sue thereon, although not named therein."
>
> "In the absence of waiver or estoppel, the plaintiff's rights in such case were not affected by a settlement between the insured and the insurance company with knowledge of the claim of plaintiff's assignor."

There is another feature which has a very important bearing upon certain classes of cases coming under the Commission Clause, and it is the doctrine of ratification. As a matter of course, no question of ratification arises in a case where the bailee has agreed to procure insurance for the owner's benefit, or is otherwise legally liable for fire damage, and in some States, it is held that ratification is unnecessary if the insurance was taken out in pursuance of a custom of trade, but in every case where the taking of the insurance has been the gratuitous act of the bailee, the owner must show, if he would claim the benefits of the contract, that he ratified the transaction and adopted the contract within a reasonable time after knowledge of the same came to him, even though it be after the fire. The adoption need not have been in any prescribed form but it is a question of fact for a jury.

(*Southern Cold Storage & Produce Co. vs. Dechman,*— Tex. 1903— 73 S. W. 545).

The Appellate Division (New York) in deciding the Utica Canning Co. also so held, in these words:

> "The form of policy is similar in its legal effect to the policy 'for whom it may concern' and it arises in much the same way. The insurance is taken out by an agent, consignee or third party and inures to the benefit of the real owner of the goods who need not have given original authority therefor, nor need he adopt the policy prior to a loss; but an adoption within a reasonable time after the loss is sufficient to bind the insurer."

The bailee, as we have seen, may collect the entire loss. In some cases he *must* do so, or he will be held personally liable to the owner. Such is the case when the insurance has been procured by the instruction or direct authority of the owner, or at his expense, or in pursuance of an agreement by the bailee to provide insurance for the owner's benefit, and it is held in some of the States that if by reason of a custom of trade, it became the duty of the bailee to provide insurance upon the property in his custody, he must not only insure such property for a reasonable amount, but must be held to "diligence and discretion" in collecting the loss (*Southern Cold Storage & Produce Co. vs. Dechman* supra).

Upon receiving payment of any insurance upon the property of another, the bailee, irrespective of whether he was actually liable to the owner, must account to such owner for the entire amount collected, save only his proper charges or liens against the property (*Symmers vs. Carroll* 207 N. Y. 632); "The money obtained from the insurance simply takes the place of the property itself and as a matter of course, would belong to the owner" (*Southern Cold Storage & Produce Co. vs. Dechman* supra).

So much for those principles, which having been interpreted by the Courts, are now regarded as settled. There are a number of other features, which in view of interpretations now placed upon the commission clause, are live and important questions but which have not been settled. One of the foremost of these is that of contribution. If, in a given case, the bailor is entitled to claim the benefit of the bailee's insurance, but happens to have specific insurance, in his own name, sufficient we will say, to fully cover his loss, are his insurers entitled to contribution from the bailee's policies? The affirmative was held in the Baltimore Warehouse case, but there the controlling feature, no doubt, was the fact that the specific policies were by their terms payable to the Warehouse Company.

Now I do not pretend to say that I can tell you how that question should be or is going to be settled, but here is my view of it:—I believe that when a man, having goods in the custody of a bailee, proceeds to insure the property in his own name, he does so because he does not intend to rely upon his bailee's insurance, and I would regard the existence of specific insurance in the name of the bailor, as proof conclusive, that so far as he is

concerned, the element of intent is wholly lacking, but it is held by our Appellate Division in the Czerweny case, that it is the intent of the bailee, which controls, and that no intention which the bailor may have had in regard to the insurance, can be imputed to, or taken advantage of, by the bailee. If that is a correct statement of the law, it certainly would seem, in a case where the bailee did intend to cover all the property in his custody, and the bailor duly ratifies and adopts the contract, both sets of policies would then cover the same interest, and it is difficult to see why the specific policies are not, in that situation, entitled to contribution from any unexhausted portion of the bailee's insurance.

Another question probably no less important is that of co-insurance. The Society has already been treated to a very able and full discussion of this topic, in a paper presented but a short time ago, which leaves little, if anything, to be said under this head, and we will dismiss it with a word as we pass along. We will all agree that the question of whether the value of the property of others in the custody of the assured, is to be taken into account for co-insurance depends upon whether the policies cover it. We have seen the construction which, without exception, the Courts have placed upon the wording "held in trust or on commission," which makes of it not a question of whether the bailee was liable, but did he intend the owners should have the benefit of his insurance? The mere use of the words of the Commission Clause, you will recall, is held to create the presumption that such was the intent. Unless such presumption be overcome, all such property was under the protection of the policies and must be included. Particularly will this be true if there has been a ratification by the bailor, in fact, in such a case I should say there is no alternative, and the assured may only get what comfort he can from the reflection that he may be suffering from an over-dose of liberality, either self-administered, or on the part of the gentleman who got up his form.

Up to the Utica Canning case, it seems to have been everywhere held that the mere voluntary act of the bailee in procuring insurance with the commission clause, involved him in no duty or liability to the bailor, unless he collected insurance money upon the bailor's property, but in the case to which reference has just been made, the Court seems to have gone much further: The holding was—"Lewis DeGroff & Son were bailees for hire, and *having insured the property,* were *liable to it* (meaning Utica

Canning Co.) *for the damage sustained.* Until there shall be some other or further ruling, the words I have just read you is the law of this State. Does it mean that a bailee, liable under the common law for reasonable care only, will by the mere acceptance of a policy containing the trust and commission clause, make himself liable for every damage by fire which, under any circumstances, may occur to property of others on his premises? If so, is his liability absolute or conditional upon his being able to collect from the Insurance Company?

These and numerous other questions growing out of the very general, and I may say indiscriminate, use of the commission clause, are yet to be decided, including no doubt, many features which have not yet occurred to any of us, and having no ambition to be known as a prophet, I prefer to withhold my guess as to the outcome. All we really know is that the end is not yet.

Up to this point our consideration has been directed to what I would term the usual form of commission clause, "held in trust or on commission, or sold but not delivered or removed." There are variations in somewhat general use which are chiefly distinguished by a reference to the assured's liability. A favorite form is "and (sometimes the word "or" is used) for which the assured may be legally liable." When used in the precise form stated, the additional wording is in no sense restrictive, but rather the reverse, as it adds one more class (that for which the assured may be legally liable) to the cover of the policy, but if the words "for which the assured may be legally liable" are used, without the prefix "and" (or its running mate "or"), the restriction is, of course, very pronounced and gives to the clause the precise meaning which was originally intended. Your commission clause would then read, "Held in trust, or on commission, or sold but not delivered or removed, for which the assured may be legally liable" and your assured's loss, as to the property of others, would be measured accordingly.

We have all been taught as one of the fundamentals of our business, that the contract is an insurance of the person and not of the property. I realize this to be true even as regards the commission clause in its broadest form, although I confess there are times and places, to which one will come in an examination of this question, when one's faith in early teaching will be shaken for a moment, but the insurance contract is still, as it always has been, a personal contract, but under the commission clause,

of the form now generally in use, the Underwriter does not always know who that person is: Sometimes even the assured does not know and frequently, nobody knows: That the Underwriter ought to know is another of those fundamentals upon which our business is grounded, the wisdom and propriety of which is nowhere denied.

The time is not only coming, but has arrived, when in the interest of both the assured and the Companies, there should be some reasonable and definite limit upon this form of contract. Its scope is controlled, as we have seen, by the intent of the bailee, but in scarcely one case in a hundred can the bailee tell you what his intent was, because he had none. Probably he learns for the first time, after the fire, that there is such a thing as the Commission Clause, much less that he has one on his own policies, and where the assured gives the matter any thought at all, he undoubtedly understands and believes the clause is to protect him only in case he shall be liable. In the great majority of cases, that is all the assured intends to cover; it is all he wants or needs and all he ever supposed he had, and when he comes to understand the situation, it will be all he will be willing to take. It is no longer any compliment to the assured, or a safe or wise thing to bestow upon him an unqualified form of commission clause, unless there is some occasion for it.

In the isolated case where by reason of a special situation, the assured requires a broader form of policy, you will, as has already been suggested upon this floor, best serve him if you divide the cover into two contracts, one to cover property of his own (including goods which he may have sold but which are not yet delivered), and another "for account of whom it may concern" to apply to such of the described property as may be "held in trust or on commission and/or for which he may be liable," and although questions bearing on the construction of the Commission Clause will necessarily continue to arise, in case of loss your assured's interest as to such matters would be very largely that of a spectator, and he will learn then, if not before, that the contracts you have provided to meet the conditions of his case, have not only been good, but the best and the best is good enough.

PRINTED FEBRUARY, 1917

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TITLE